



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of the DNR Abatement Action to  
Remove or Reduce the Number of Berths and Size  
of an Alleged Illegal Pier Constructed and  
Maintained by Members of Page's Homeowners  
Association on the Bed of Green Lake, Town of  
Princeton, Wisconsin

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Case No. 3-NE-01-0510

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Department of Natural Resources (DNR or Department) staff, North East Region, having conducted field investigations beginning in October 1997, allege the following:

On October 2, 1997, DNR Conservation Warden Cletus Alsteen received a complaint of possible riparian zone conflicts in Kelm-Oelke Beach Assessor's Plat on the western end of Green Lake. On October 2 and 3, 1997, Warden Alsteen met onsite with various interested parties to discuss riparian zones and pier placement. Warden Alsteen inspected the existing piers, measured 44 inches as the water depth at the eastern end of the main part of the Association's pier, and counted 18 (not 22) berths on the Association's pier. He advised Association members of the public trust factors DNR would evaluate if the Association applied for a pier permit.

By letter dated August 3, 1998, to DNR Water Management Specialist Shawn Eisch, Association attorney Carl Sinderbrand asked if the Association would need a pier permit to replace its existing pier with 2 piers of the same length. Two piers with 14 berths each would be placed—one on or near the north lot line and one on or near the south lot line of the 77-foot wide lot (28 total berths). All berths would be on the inside of the piers to prevent Association boats from entering neighboring riparian zones.

On numerous occasions over the next three years, Water Management Specialist Eisch advised the Association of the DNR's position that the piers placed or any proposed expansion required a Wis. Stat. § 30.12 permit and were not lawful without a permit.

At an October 16, 2000, meeting the Association by President John Hilton asserted that in 1993 DNR employees advised the Association that it did not need a permit.

On January 8, 2001, Mr. Eisch met onsite with Mr. Hilton and opined that the existing pier requires a permit. By letter faxed March 2, 2001, to Mr. Eisch, Mr. Hilton again asserted that DNR had advised the Association in 1993 that a permit was not needed unless the Association increased its number of berths.

By letter dated March 19, 2001, to Mr. Hilton, Mr. Eisch again enclosed a permit application, stated that the pier requires a permit, and asked the Association to submit an application and any documentation it had regarding the 1993 meeting with DNR staff which the Association asserted had occurred. He further advised that the file would be referred for hearing if he did not receive an application by April 19, 2001. No permit application has been received to date.

Pursuant to due notice hearing was held in Green Lake, Wisconsin on August 27, October 2, and October 3, 2002, before Jeffrey D. Boldt, administrative law judge. Numerous parties submitted written closing arguments, and the last was received on October 28, 2002.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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#### FINDINGS OF FACT

1. In 1958 Nelson Page subdivided, platted, and recorded the plat of non-riparian land he owned west of Lakeshore Drive, Town of Princeton, Green Lake County, Wisconsin into Page's Subdivision. In 1961 he did the same for additional non-riparian land he owned immediately west of Page's Subdivision, and named the new subdivision Page's First Addition. In 1967 a plat was recorded for Kelm-Oelke Beach Assessor's Plat, a subdivision of riparian lots east of Lakeshore Drive (opposite Page's Subdivision) and bordering the western shore of Green Lake, a navigable lake in Green Lake County, Wisconsin. The plat shows Nelson Page owned Lot 31, a lot with 77.2 feet of riparian frontage. Beginning some time in the late 1950's and ending with his death in 1979, Nelson Page conveyed various undivided 1/38 interests in the land comprising Lot 31 (both before and after it was platted as a subdivision lot), usually to persons buying lots in Page's Subdivision and Page's First Addition. After his death the personal representative of the estate of his devisee Pearl Polash, and Ms. Polash's devisees upon her death, conveyed additional 1/38 interests in Lot 31 to various parties (Ex. 33 NR)

2. Page's Homeowner's Association (the Association) is an unincorporated association established in 1966 whose membership consists of some (not all) owners of Lot 31. All current members of the Association are listed in Ex. 29 NR.

3. Since 1966 the Association has placed a pier with a varying number of boat slips below Green Lake's ordinary high water mark and adjacent to Lot 31. Except for Mr. Wilsnack, all Lot 31 owners assent to the Association placing a pier on Lot 31. (Ex. 38 NR) Association bylaws adopted in 1972 state that homeowners in Page's Subdivision may apply for membership (memberships rights are not granted for vacant lots). Payment of membership fees, dues, and

assessments entitles Association members (“members”) to use the Association pier and swim raft at Lot 31. (Ex.15 NR)

4. Minutes of Association annual meetings from 1966-91 list the number of members each year. Though every member did not always use a berth or place a boatlift every year, the minutes provide some evidence of historical pier use for 1966-91. There were 5-6 members in 1966-68, 8 in 1971 and 10 during the period of 1972-74, 11 during the period of 1974-76, 15 in 1978, 17 in 1981, 19 in 1988, and 22 in 1990. (Ex. 32 NR) The Association furnished charts for 1991-2000 that shows for each of those years the number of berths and which members used a berth. The charts that show numbers of berths (rather than members) show 19 berths in 1991, dropping to 16 in 1994-95, and rising to 21 by 2000. (Ex. 15 NR) Both members and DNR provided photos showing the pier in past years and today. (Exs. 19 NR, 22 NR, 25 NR, 26 NR, 28 NR, 30 NR)

5. The pier the Association currently places at Lot 31 is 249 feet long, 3 feet wide, and has 22 berths. Water depth at the lakeward end is currently approximately 44 inches. None of the boats placed at the pier have a fixed keel or nonfixed keel measured with the centerboard or dagger boards raised that requires a water depth of greater than 3 feet for navigation. (Eisch, Alsteen) The Association concedes that the existing pier extends beyond the three-foot water depth contour associated with the line of navigation. (Hack; Ex. 89) However, the Association contends that the pier does not extend past a recorded summertime low water level. The line of navigation is the 3 foot water depth contour or a greater depth contour if required for boats in use or appropriate for use on the waterway, based on the normal summertime low levels on the waterway or summer minimum levels where established by department order. Wis. Admin. Code § NR 326.03(3). However, DNR engineer Linda Hyatt was persuasive that the recorded summertime low that the Association relies upon was simply a recording error. The recorded level was grossly inconsistent with the water reading on previous and later days and it would be physically impossible for so much water to enter and leave Green Lake in such a short period of time. (Hyatt) The greater weight of the credible evidence demonstrates that the pier extends past the line of navigation.

6. The Association first contacted DNR regarding their pier in 1993. On September 10, 1993 DNR representatives Ken Johnson, Andy Nelson, Vic Pappas, and Cletus Alsteen met at Lot 31 with Marvin Streich and Michael Orth of the Association and their attorney. (Ex. 42) At this meeting, DNR staff took a somewhat ambivalent attitude toward the Association pier. The pier’s size and density were both excessive under DNR “reasonable use” guidance, however, the Department indicated it would not commence an enforcement action unless a complaint was received.

7. On October 2, 1997 Conservation Warden Cletus Alsteen received a complaint of possible riparian zone conflicts at Lot 31. Alsteen visited the area, and saw 3 piers on neighboring riparian lots. The Warden determined that the piers were placed by Howard Hempe on Lot 30 (north of Lot 31), the Association on Lot 31, and Dave Meister on the adjacent lot immediately south of Lot 31. (Alsteen, Ex. 2 NR)

8. At that time an Association member informed Warden Alsteen that the Association was interested in increasing its berthing density above its 22 existing berths. Warden Alsteen stated that the Association would need a pier permit to do so, and that DNR would consider reasonable use, cumulative impact, the *Sterlingworth* decision and other factors in deciding whether to issue such permit. (Alsteen, Ex. 2 NR)

9. On October 3, 1997 Warden Alsteen met onsite with Mr. Hempe, 3 Association members, and Mr. Meister to discuss riparian zones and pier placement. At that time, the water depth at the lakeward end of the main part of the Association pier was 44 inches, and there were 18 berths on the Association pier. The Warden properly advised the Association of the public interest factors the DNR would evaluate if the Association applied for a pier permit. (Alsteen, Ex. 3 NR)

10. On August 3, 1998, the Association asked Mr. Eisch of the DNR if it needed a permit to replace its existing pier with 2 piers of the same length, 14 berths each, one pier placed on or near the north and one on or near the south lot line of Lot 31. In response to that proposal, and repeatedly over the next 4 years, Eisch and other DNR staff advised the Association of DNR's position that: the existing pier and any proposed expansion exceeded Wis. Stat. § 30.13 standards to maintain a pier without a permit; that the Association must apply for a permit if it wished to maintain the current pier or any pier exceeding the Wis. Stat. § 30.13 standards; and that DNR would seek a hearing under Wis. Stat. § 30.03 if the Association did not reduce the pier to Wis. Stat. § 30.13 standards or submit a pier permit application. (Exs. 5 NR, 10 NR, 13 NR pp. 1, 3, 4, 14 NR, 16 NR pp. 1, 3)

11. In 1998 and in late April 2000, Eisch received complaints from a neighbor about the Association pier. (Eisch, Exs. 7 NR, 11 NR) By June 2001, Eisch had not received a pier permit application. He forwarded the file requesting this abatement hearing under Wis. Stat. § 30.03.

12. The Association submitted an application for a pier permit in May 2002. (Ex. 29 NR) One owner, Jon Wilsnack, refused to apply for a permit and stated that he opposed its issuance. (Wilsnack, Ex. 35 NR) All other owners agreed to apply for a permit, but the Department maintains it does not have a complete application for which it can grant a permit unless all owners apply. (Eisch) Attorney Jon Wilsnack asserts that he owns between 4/38 to 7/38 of an interest in Lot 31. All parties concede that Mr. Wilsnack owns at least 2/38 of an interest in Lot 31. As an unincorporated body, the Association did not have a governing board authorized to act on behalf of all members. The Association has been unable to gain agreement among all owners to apply for a permit. Accordingly, this hearing was solely an abatement hearing and did not consider a permit application.

13. The existing pier does not meet the standards in Wis. Stat. § 30.13(1) to be placed without a permit because it extends beyond the line of navigation into 44 inches of water. Given that the existing placement exceeds the reasonable use threshold of 2 to 3 by 700 percent, the pier also requires a permit because it exceeds "reasonable use" and thus interferes with public rights in the waters of Green Lake. (See: § 30.13(1)(a), Stats.)

14. Warden Alsteen testified that the design and congestion of the slips on the Association's pier limited visibility for boat operations because of the number of lifts. Further, it might be necessary to use the neighboring riparian zone to egress and ingress. A boat operator entering the Association pier has to maneuver his boat past neighboring piers and boats and then turn to enter the slip, since very few berths on the Association pier have a straight-line approach. (Alsteen) The Warden opined that even experienced operators can have difficulty in attempting to maneuver in limited space, and that maneuverability would become even more questionable when compounded by wave action and boat wakes. (Alsteen, Ex. 23 NR)

The west end of Green Lake has high boat traffic from Dodge Memorial County Park, the most popular spot on the lake on summer days and weekends, and from day use from several Town of Princeton public access lots immediately south of the Association pier. Warden Alsteen also expressed safety concerns for boaters in the area because the pier extended lakeward past the 3-foot line of navigation. The pier is one of the longer privately owned piers along the western side of Green Lake. (Exs. 21 NR, 22 NR) The greater weight of the credible evidence demonstrates that the existing pier constitutes a hazard to navigation because of its length and the large number of boats navigating in a relatively narrow access area. (Alsteen, Ex. 23 NR)

15. The existing pier interferes with Howard Hempe's enjoyment of his riparian zone on Green Lake. The overall density of the Association pier and attached boatlifts and canopies is visually intrusive to the Hemptes. Further, the congestion creates a safety hazard for swimmers using the Hempe's riparian zone. Hempe testified that his wife was startled and frightened by a boat that cut close to her when she was swimming without wearing her hearing aid. This corroborates the Warden's testimony that the existing pier configuration and density can create a safety hazard because of congestion and limited visibility.

16. The Department has established a non-binding Program Guidance (the guidance) to interpret the public interest standard relating to the "reasonable use" of riparian property. The guidance is not applied with the force of law but is used in part to establish a threshold to determine if a riparian has exceeded the "reasonable use" of riparian mooring privileges. This limitation on the use of a given riparian zone is related to the amount of water frontage owned by the riparian and also to whether the pier structure provides any public benefit in the form of rental slips made available to the public. (Id.) The pier provides no benefit to the non-riparian public, as would occur from the operation of a public marina.

The guidance reads as follows with respect to Existing Berthing Facilities:

Existing, berthing facilities which exceed "reasonable use" guidelines may continue to rely on any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects). The Department may apply "reasonable use" criteria and require modification or commence an enforcement action against any existing facilities (particularly those undergoing major repair) for which a permit has not been issued if it finds that current statutory requirements have not been met. Generally we will not hold existing facilities to the same "reasonable use" guidelines which we will apply to new proposals since, to some

extent, they may have established some limited interest in use of existing facilities. (Exhibit 17 NR, p. 5)

Under the guidelines a riparian with 77 feet of shore would be allotted 2-3 boat slips on its pier. The guidelines state that DNR will generally not hold existing facilities to the same "reasonable use" standard applied to new proposals, and that historical use of the site and existing pier should be considered in determining reasonable use. (Ex. 17 NR) However, the guidelines also note that multiple owner "access lots" or other similar ownership arrangements are not entitled to greater berthing privileges than the shoreline frontage would otherwise provide. (Ex. 17 NR) The Guidance provides as follows:

"Multiple owner lots such as condominiums, 'access lots' or other similar ownership arrangements are not entitled to greater berthing privileges than the shoreline frontage would otherwise provide (2 for the first 50 feet and 1 for each additional 50 feet)." (Ex. 17 NR, p. 28)

17. For purposes of the "historic use" factor, the Division finds that no more than 11 slips were placed at the site for the first 10 years that the Association placed a pier. While the number of slips has increased beyond 11 after 1976, this does not reflect the "historic use" but rather the Association's continuing effort to pack as many boats as possible into its small riparian zone to accommodate Association members.

18. The existing pier has direct and cumulative adverse impacts to the wildlife and fish habitats in Green Lake. Warden Alsteen testified that he has seen large rafts of Canada Geese and some diver ducks using the Association pier littoral zone area, especially in late autumn, resting and feeding on the wild celery tubers in the area, and observed the birds resting in this area during annual migrations. (Alsteen, Ex. 23 NR) Jim Holzward, the DNR Wildlife Biologist for the area, testified that canvasback ducks, a duck prized by hunters, feed on wild celery tubers. Wild celery comprises an important part of their diet. (Ex. 36 NR, Holzward) There are wild celery beds in the area of the pier. (Eisch, Sessing, Holzward) Canvasbacks are the least abundant of all extensively distributed game ducks in North America, and their population has generally declined due to overhunting and habitat loss. (Holzward) Holzward noted that it was very apparent that the pier and shading by boats was restricting growth of wild celery in the area. (Ex. 36 NR) Dave Bartz, the DNR Fisheries Biologist, testified that the pier has a detrimental impact on the fishery in the area. (Bartz) Bartz opined that there was no question that fish habitat in the area would improve if the pier and boats placed in the area were removed.

19. Both sides presented expert testimony that the existing pier configuration and the parking of boats in pier slips shades out beneficial aquatic vegetation in the littoral zone. (Sessing, Hack) It is also undisputed that wild celery and sago pondweed are the most widely distributed plant species in the area. Mr. Hack, of Northern Environmental Consulting, opined that if boat slips were removed and fewer boats parked in the area, that there would be some improvement in aquatic plant communities but that this would not be significant because of all of the human activity in the area. Mr. Sessing of the DNR opined that the plants would improve significantly. Sessing offered photos that demonstrated this point in an area around a seldom-used boatlift. (See: Ex. 49) The photos demonstrate that there is a dramatic improvement of

aquatic vegetation in areas that are no longer subject to shading from boats parked on the public waters during most of the growing season. (Compare: Ex. 49 with Ex.50) The greater weight of the credible evidence demonstrates that aquatic vegetation is likely to improve if pier slips are removed. The existing pier configuration is detrimental to the public interest in maintaining beneficial aquatic vegetation in Green Lake.

20. The length and density of the existing pier in relation to the 77 feet of riparian frontage on which it is placed exceeds the reasonable use to which a riparian owner is entitled. (Eisch, Alsteen) The evidence indicates that the area of public waters of Green Lake taken up by the Association pier is unreasonable in relation to the riparian frontage owned by the co-owners of Lot 31. This deprives the public of its ability to use those areas for the uses protected by the public trust doctrine – including swimming, wading, and fishing. The pier is a purely private use of public waters with no public benefits, unlike a marina whose slips are available to the public for rental, or a public pier at a park which can be used by all members of the public.

21. The co-owners of Lot 31 are financially capable of constructing, maintaining, or removing a pier placed without a permit under Wis. Stat. § 30.13 if it should be found in the public interest to do so.

22. The Association pier has not been validly permitted. It would be fundamentally unfair to riparians who have obtained the required permit to allow greater privileges to an unpermitted facility, however long it has been placed in public waters. However, given the longstanding placement of the pier, it would also be unfair to restrict the pier to the three slips that the guidance would allow for construction of a new pier. Balancing the rights of the public with the rights of the private riparians, a pier containing 11 slips and extending no more than 226 feet is at the limits of a reasonable use of this small riparian zone. Further, the existing lakeward deck must be removed so that no part of the pier exceeds 6 feet in width. The existing pier must have 23 feet removed from its lakeward end to comply with this order. Even when the pier is so reduced, the Association will continue to place one of the largest piers in the area on one of the smallest riparian tracts.

23. The existing pier has direct and cumulative adverse impacts to the natural scenic beauty of Green Lake. The dense packing in of boats in this small riparian zone is visually obtrusive. However, the existing pier configuration is more visually obtrusive looking at the pier from land to water rather than from water to shore. Thus the impacts on natural scenic beauty are more noticeable to neighboring riparians than to members of the public using Green Lake.

24. The Association has not shown that the DNR is equitably estopped from pursuing this abatement action as a result of any past representations of Department staff. There was no inequitable action or non-action by the Department that induced the Association not to seek a permit. DNR staff repeatedly informed the Association that its pier was at risk of an enforcement action if a complaint was received and the Association did not acquire a permit. Further, even the legal opinion letter of Attorney Sinderbrand warns of some risk to the Association in not acquiring a permit. Accordingly, any “reliance” by the Association on actions or inaction of the DNR would not be reasonable. It must be noted that the Association pier still does not have a lawful permit, even after this hearing. The public will accordingly continue to



have a right to seek further reduction in the number of boat slips if in the future it is established that maintaining 11 boat slips are detrimental to the public interest in navigable waters or the rights of neighboring riparians.

## DISCUSSION

The threshold issue is whether the Association pier requires a permit. There is no question that the existing pier extends beyond the three-foot depth contour and thus requires a permit under Wis. Admin. Code §§ NR 326.03(3), 325.04, and 326.05. (Alsteen, Eisch, Exs.) The permitting criteria under Wis. Adm. Code § NR 326.05 supplement the criteria in § 30.13(1), and to escape the permitting process a pier must satisfy the requirements of § 30.13(1) and the regulations in § NR 326.05. (Id.) Further, the pier violates public rights in public waters because it grossly exceeds the “reasonable use” threshold of 2 to 3 boats. (§ 30.13(1)(a)) As discussed above, there is nothing in the DNR’s Program Guidance or correspondence from DNR staff which “grandfathers” the pier in as a non-conforming use. Rather, such non-conforming piers are not held to the same reasonable use threshold as a new pier would be.

In considering pier placement under Chapter 30, it is “necessary” to “balance” the rights of riparian owners with the rights of public in public waters subject to the public trust doctrine. *Sea View Estates Beach Club v. DNR*, 223 Wis. 2d 138, 157, 588 N.W. 2d 667 (Wis. Ct. App. 1998) The law recognizes no absolute right to park a boat in one’s riparian zone. Rather, the common law recognizes the rights of a riparian “to reach navigable water, to have reasonable ingress and egress to navigable waters, and to have reasonable access for bathing and swimming.” *Godfrey v. Lopardo*, 164 Wis. 2d 352, 374, 474 N.W. 2d 786, 796 (Wis. Ct. App. 1991) What is “reasonable” is a site-based determination, based in part upon the amount of frontage owned by the riparian. *Sea View Estates*, p. 158 (See: *Rondesveldt v. Running* 19 Wis. 2d 614, 621, 121 N.W. 2d (1963))

The existing Association pier parks 22 boats on the public waters, attached to a riparian lot that is only 77 feet wide. This clearly exceeds a “reasonable use” of this riparian zone. As the Wisconsin Court of Appeals held in *Sterlingworth Condominiums v. DNR*, 205 Wis. 2d 721-722, relatively minor and localized detrimental impacts can have a profound impact on the resource as a whole. The Court held that:

Although nine additional boat slips may seem inconsequential to a proprietor such as Sterlingworth, we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public’s interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of “cumulative impact” must be taken into account. *Sterlingworth*, at p. 205 Wis. 2d 721-722

The Association relies heavily on meetings with DNR officials which it claims “grandfather in” the piers, or equitably estop the DNR from pursuing an enforcement action. There were two quite different recollections of past meetings between DNR staff and the

Association that were described at hearing. However, what is clear is as follows: 1) the Association did not apply for or ever obtain a permit; and 2) the DNR knew for nearly ten years about the Association pier and did very little to pursue an enforcement action. When a complaint was received, the DNR sought to reduce the pier substantially, from 22 slips to 6. This seems somewhat unfair, given the Department's "wink and nod" approach to pursuing any enforcement action against the Association pier.

Clearly, there has been a multi-slip pier at the site for an extended period of time. Balancing the "historic use" of the site into the reasonable use calculation argues for approval of more than the reasonable use threshold of 2 to 3 slips. The DNR's failure to pursue any enforcement action after having detailed meetings regarding the pier also weighs on the side of approving some number of slips over the threshold "reasonable use" number.

While the Association has not proven any of the necessary elements of a formal legal equitable estoppel, the failure of the DNR to seek an enforcement action can be considered in the balancing of public and private rights. The explicit failure of the DNR to seek an enforcement action against a pier it has known about since 1993 adds weight to the private rights side of the balance. The DNR does not have adequate staff to seek out and find every non-conforming pier. However, the Department does have a responsibility to pursue conspicuously unreasonable uses of riparian frontage when it learns of such violations. To wait for complaints in such circumstances pits neighbor against neighbor in a way that is unfortunate and unnecessary. Further, it leads to confusion that such piers are lawful and "grandfathered in" as a non-conforming use.

However, the existing pier creates a safety hazard due to congestion and impaired visibility. Further, the large number of boats shades out aquatic plant growth in a large area. Eleven boats are the maximum reasonable use under these circumstances. It should be noted that such multi-owner lots are now restricted on Green Lake and it is unlikely that others will be approved. As a result, there is less concern about "cumulative impacts" than if such restrictions were not in place.

Accordingly, the Order below attempts to reflect these facts and allows the Association to place 11 slips. This will likely not please either the DNR or the Association, but it seems reasonable under these unique circumstances. Association members will have to work out a method to allocate the slips.

## CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.03(4)(a) and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to order removal of structures which violate Chapter 30.

2. All of the persons listed on Ex. 29 are riparian owners within the meaning of Wis. Stat. §§ 30.12 and 30.13.

3. The existing pier described in the Findings of Fact constitutes a structure within the meaning of Wis. Stat. §§ 30.12 and 30.13.

4. The existing pier does not meet the requirements of a pier that can be placed without a permit. The existing pier violates “Public rights in navigable waters” and “the rights of other riparian owners” within the meaning of § 30.13(1)(a) and (b).

5. The line of navigation is the 3 foot water depth contour or a greater depth contour if required for boats in use or appropriate for use on the waterway, based on the normal summertime low levels on the waterway or summer minimum levels where established by department order. NR 326.03(3), Wis. Admin. Code. The existing pier exceeds the “line of navigation” and thus violates the “pier standards” set forth in Wis. Admin. Code § NR 326.04(1).

6. Pursuant to the motion of the Department, the existing structure constructed and maintained by Page’s Homeowners Association is found to violate Wis. Stat. §§ 30.12 and 30.13 and is declared an unlawful obstruction pursuant to Wis. Stat. § 30.13(4)(a) and a public nuisance pursuant to Wis. Stat. § 30.294. The Order for Removal as set forth below is necessary to ensure compliance with Chapter 30.

7. The reasonable use guidance document drafted by the Department sets forth factors to be considered in determining what constitutes a “reasonable use” of a particular riparian parcel. *Sea View Estates Beach Club, Inc. v. DNR*, 223 Wis. 2d 138, 152-53 (Ct. App. 1998) The “historic use” of this parcel is one factor considered in reaching this determination, but the size of the lot and its impact on navigational safety, the resource, and the rights of neighboring riparians are also considerations. *Id.* The Order below reflects the balancing under the unique circumstances described above.

8. An administrative agency is not a court of equity and possesses only such powers as are expressly granted to it or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 2d 440 (1944). By its very nature “equitable estoppel” is an equitable remedy not generally available in an administrative context.

9. The three elements of equitable estoppel are as follows: (1) Action *or nonaction* which induces (2) reliance by another (3) to his detriment. In addition, the proof of estoppel must be “clear and convincing” and may not rest on conjecture. The Wisconsin Supreme Court has held that in order to estop the government, the government’s conduct must be of such a character as to amount to “fraud”. The word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

The term ‘fraud’ used by the court is not to be construed here as it is used in the ordinary sense—as an artifice, a malevolent act, or a deceitful practice.

The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with “unconscientious” or “inequitable.”

*State v. City of Green Bay*, 96 Wis. 2d 195, 202, 291 N.W.2d 508 (1980).

Further, even if the three elements of estoppel are proved, in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied. *Id.*, p. 210

Page's Homeowners Association has not proven that this action should be equitably estopped by "clear and convincing evidence." See: *City of Madison v. Lange*, 140 Wis. 2d 1, 6, 408 N.W.2d 763 (Wis. Ct. App. 1987) The Association has not shown any of the elements of equitable estoppel by "clear and convincing evidence." There was no "fraud" by the DNR relating to placement of the Association pier.

10. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing *Hixon v. PSC*, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts upon the public waters of the state if the pier were not modified as set forth in the Order below. The Order reflects the fact that it is unlikely that similar multi-owner piers will be placed on Big Green Lake given current restrictions.

11. Specific structures may be determined to be "detrimental to the public interest" within the meaning of Wis. Stat. § 30.12(2) on the ground that they may impair natural beauty. This is a proper basis for denial of a permit. *Claflin v. DNR*, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). While the existing pier is well maintained, the dense placement of boats detracts from the natural features of the shoreline, particularly as viewed from shore. The pier, if modified in accordance with the Order set forth below, will not be detrimental to the public interest in natural scenic beauty.

12. Issuance of an abatement order under Wis. Stat. § 30.03 is a type IV action under Wis. Admin. Code § NR 150.03(8)(f)19.d, which does not require the preparation of a formal environmental impact assessment.

## ORDER

### WHEREFORE, IT IS HEREBY ORDERED,

That the existing pier shall be removed or reconfigured to comply with Wis. Stat. § 30.13 as determined in Finding of Fact No. 22 within ninety (90) days of this order.

After ninety (90) days from the date of this Order, Page's Homeowners Association and any and all riparian owners of Lot 31 are prohibited from placing any pier at Lot 31 unless:

1. The total size and density of any and all piers placed at Lot 31 does not exceed the size and density determined in Finding of Fact No. 22 to comply with Wis. Stat. § 30.13; or

2. Unless they first obtain a permit under Wis. Stat. § 30.12 for any such pier(s).

Dated at Madison, Wisconsin on November 22, 2002.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 267-2744

By: \_\_\_\_\_  
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

### NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.